

# SEXTING

Presented by  
Chris Phillis  
Maricopa County  
Juvenile Public Defender

# Sexting

- ▣ What is sexting
  - the act of sending sexually explicit messages or photographs, primarily between mobile phones

A social danger with sexting is that material can be very easily and widely propagated, over which the originator has no control.



# Categories of Sexting

- ▣ Single Text – Usually one picture sent between a girlfriend and boyfriend.
- ▣ Mass Text – One image sent to several phones. Often done in retaliation or as a prank. The sender may be the subject in the text or a former “friend”.
- ▣ Unwilling participant – Subject of the text is unaware the photo was taken.

# Categories, continued

- ▣ Nude Pictures – Girl or Boy appear unclothed.
- ▣ Sexual Conduct – Girl or Boy is engaged in a sexual act or state of arousal.



# Definitions

- ▣ "Obscene" means material or a performance that:
  - average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex
  - depicts or describes:
    - ▣ patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

- patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs, and
- taken as a whole, lacks serious literary, artistic, political, and scientific value

# OBSCENE DISPLAY OR DISTRIBUTION

- ▣ A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution
- ▣ An offense under this section is a Class C misdemeanor



# SEXUAL PERFORMANCE BY A CHILD

## ▣ A) In this Section:

- "Sexual performance" means any performance or part thereof that includes sexual conduct by a child younger than 18 years of age.
- "Sexual conduct" means sexual contact, **actual or simulated sexual intercourse**, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or **any portion of the female breast below the top of the areola**.



- "Performance" means any play, motion picture, photograph, dance, or other visual representation that can be exhibited before an audience of one or more persons.
- "Produce" with respect to a sexual performance includes any conduct that directly contributes to the creation or manufacture of the sexual performance.
- "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.

- "Simulated" means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks.
- "Deviate sexual intercourse" and "sexual contact" have the meanings assigned by Section 43.01.

- ▣ B) A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance. Boyfriend asks his girlfriend to send him a provocative picture.
- ▣ C) An offense under Subsection (b) is a felony of the second degree, except that the offense is a felony of the first degree if the victim is younger than 14 years of age at the time the offense is committed.

- ▣ D) A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child younger than 18 years of age.
- ▣ E) An offense under Subsection (d) is a felony of the third degree, except that the offense is a felony of the second degree if the victim is younger than 14 years of age at the time the offense is committed.

- ▣ G) When it becomes necessary for the purposes of this section or Section 43.26 to determine whether a child who participated in sexual conduct was younger than 18 years of age, the court or jury may make this determination by any of the following methods:
  - personal inspection of the child;
  - inspection of the photograph or motion picture that shows the child engaging in the sexual performance;

- oral testimony by a witness to the sexual performance as to the age of the child based on the child's appearance at the time;
- expert medical testimony based on the appearance of the child engaging in the sexual performance; or
- any other method authorized by law or by the rules of evidence at common law.





# POSSESSION OR PROMOTION OF *CHILD PORNOGRAPHY*

- ▣ A) A person commits an offense if:
  - the person knowingly or intentionally possesses visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct; and
  - Do you know what is on your child's phone?
  - the person knows that the material depicts the child as described by Subdivision (1).



▣ B) In this section:

- "Promote" has the meaning assigned by Section 43.25.
- "Sexual conduct" has the meaning assigned by Section 43.25.
- "Visual material" means:
  - ▣ any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or
  - ▣ any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

- ▣ C) The affirmative defenses provided by Section 43.25(f) also apply to a prosecution under this section.
- ▣ D) An offense under Subsection (a) is a felony of the third degree.
- ▣ E) A person commits an offense if:
  - the person knowingly or intentionally promotes or possesses with intent to promote material described by Subsection (a)(1); and
  - the person knows that the material depicts the child as described by Subsection (a)(1).

- ▣ F) A person who possesses visual material that contains six or more identical visual depictions of a child as described by Subsection (a)(1) is presumed to possess the material with the intent to promote the material.
- ▣ G) An offense under Subsection (e) is a felony of the second degree.

# Problems with Sexting Statutes

## Parenting Issue

- ▣ Parents need to police their children's usage of the cell phone. The parent obtained the phone for the child. If the child is using the phone inappropriately the parent needs to remove the phone. *Is there liability for the parent, the true owner of the phone?*
- ▣ Parents can give immediate consequences, the court process takes months.
- ▣ Morality is an issue that should be taught at home.
- ▣ Two consenting adults are not likely to be charged with an offense for sending unclad pictures to one another. The pictures can even be sexual in nature. Thus the offense may be an incorrigible offense – an offense that is only an offense for someone under the age of majority.

# Defending Sexting Cases

- ▣ Who took the picture?
  - Person in the Photo
  - Third party with consent of person in the photo
  - Unsuspecting third person (girl's locker room)
- ▣ Who received the picture?
  - Boyfriend/Girlfriend
  - Friend
  - Mass mailing



- ▣ Was the picture requested
- ▣ Who sent the picture
  - Who's phone or computer was it e-mailed from
  - Who has access to the phone or computer
  - Phone's and Computer's Id's can be "hi-jacked" to e-mail items that are not actual sent by the device.
- ▣ Who discovered the picture
- ▣ How was the picture discovered





- ▣ Did the person who discovered the picture share it with anyone else
  - Did anyone other than the police officer view the picture after it was discovered
    - ▣ Administration, Security, other teachers – Distribution of Child Pornography?
      - If sexting is harmful to the individuals in the picture because they do not understand the ramifications why are the images shared with others
  - Did the youth who received the image share it with anyone – friend sitting near by





- ❑ Will the defense attorney and prosecutor have access to the images for trial preparation.
  - Art. 39.15. Discovery of evidence that constitutes child pornography.
    - ❑ (a) In the manner provided by this article, a court shall allow discovery under Article 39.14 of property or material that constitutes child pornography, as described by Section 43.26(a)(1), Penal Code.
    - ❑ (b) Property or material described by Subsection (a) **must remain in the care, custody, or control of the court or the state as provided by Article 38.45.**
    - ❑ (c) A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant.
    - ❑ (d) For purposes of Subsection (c), property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides **ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial.**

## ▣ Motions

### ■ Dismiss

- ▣ Picture is protected speech if image is just of a nude person or not obscene.
- ▣ Supreme Court Cases (Osborne and Ferber) do not apply. Sexting cases can be distinguished from child pornography cases, based on the Court's rationale for restricting free speech. A child who sends pictures of themselves in a state of undress is not being physically and emotional abused. The child will not be re-victimized every time the picture is viewed.

## ▣ Witnesses

- If the receiver requested the image they are an accomplice.
- If the receiver shared the image with anyone other than a parent/teacher/police officer they distributed child pornography or at the very least obscene material.

## ▣ Evidence Issues

- Art. 38.44. Admissibility of electronically preserved document.
  - ▣ An electronically preserved document has the same legal significance and admissibility as if the document had been maintained in hard-copy form. If a party opposes admission of the document on the grounds that the document has been materially altered, the proponent of the document must disprove the allegation by a preponderance of the evidence.

- Art. 38.45. Evidence that constitutes child pornography.
  - (a) During the course of a criminal hearing or proceeding, the court may not make available or allow to be made available for copying or dissemination to the public property or material that constitutes child pornography, as described by Section 43.26(a)(1), Penal Code.
  - (b) The court shall place property or material described by Subsection (a) under seal of the court on conclusion of the criminal hearing or proceeding.
  - (c) The attorney representing the state shall be provided access to property or material described by Subsection (a). In the manner provided by Article 39.15, the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial shall be provided access to property or material described by Subsection (a).

# Controlling Supreme Court Cases Regarding Child Pornography

- ▣ *New York v. Ferber*, 458 U.S. 747 (1982)

*Facts: Ferber sold two tapes showing a teenage boy masturbating to an undercover officer. He was convicted of distributing child pornography.*

*Issue: Can the legislature prohibit the distribution of children involved in sexual conduct regardless of whether it is obscene?*

- ▣ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) – First Amendment does not protect obscene material.
- ▣ *Holding: Legislature's may prohibit the selling and manufacturing of sexually explicit material involving children regardless of whether it is obscene. The state has an interest in protecting children from the physical and emotional abuse they suffer from being subjects sexual explicit materials.*



▣ *Osborne v. Ohio*, 495 U.S. 103 (1990)

*Facts:* Four pictures were found in Osborne's home depicting a nude adolescent male in a sexually explicit pose.

*Issue:* The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography?

*Holding:* The state may constitutionally prohibit the possession of child pornography in an attempt to eradicate the market for such items, thus ending the victimization of children.



## ▣ *Ashcroft v. Free Speech Coalition*

***Facts:** The Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251, prohibits any “visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct.”*

*Issue: : May the Federal Government prohibition of all depictions of minors engaged in sexual activity violate Free Speech.*

*Holding: The Court held that CPPA violated Free Speech because is banned depictions of children engaging in sexual conduct without regard to whether the work had literary, artistic, political, or scientific value.*

*Miller Standard applied.*



# Possible Solutions

- ▣ Public Service Announcements
- ▣ Education program at schools
- ▣ Encourage cell phone companies to provide parents the ability to check texts at reasonable price.
- ▣ Information provided with family cell phone plans.